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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1400

LOUIS MANCE SUMMERLIN and
GRADY MONROE HOLSEN,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

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INDEX

Jurisdiction 2

Questions Presented 2

Relevant Constitutional Provisions and Statutes 3

Statement of the Case 4

Reasons for Granting the Writ of Certiorari 9

Certificate of Service 16

Appendix—

Opinion, Court of Criminal Appeals of Tennessee, Jackson A1

Order, Court of Criminal Appeals of Tennessee, Jackson A6

Order and Memorandum on Petition to Rehear, Court of Criminal Appeals of Tennessee, Jackson A7

Order, Supreme Court of Tennessee A9

Stay Order, Court of Criminal Appeals of Tennessee, Jackson A10

Order on Petition to Rehear, Supreme Court of Tennessee A11

Brief and Argument A12

Table of Authorities

Cases

Anders v. *California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) 11
Brooks v. *Texas*, 381 F.2d 619 (5th Cir. 1967) 10
Cardarella v. *United States*, 375 F.2d 222 (8th Cir. 1967) 10
Cissna v. *State of Tennessee*, 246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720 (1918) 8
Copeland v. *Bets*, 471 F.2d 710 (5th Cir. 1973), cert. denied 412 U.S. 952 9
Davis v. *Bomar*, 344 F.2d 84 (6th Cir. 1965), cert. denied 382 U.S. 883 9
Drew v. *United States*, 331 F.2d 85 (D.C. Ct. App. 1964) 13
Garton v. *Swenson*, 497 F.2d 1137 (8th Cir. 1974) 10
Goodwin v. *Cardwell*, 432 F.2d 521 (6th Cir. 1970) 10
In Re Smith, 3 Cal. 3d 192, 474 P.2d 969 (1970) 11
Langford v. *State of Alabama*, 422 F.2d 760 (5th Cir. 1970), cert. denied 400 U.S. 851 9
Moore v. *United States*, 432 F.2d 730 (3rd Cir. 1970) 10
Pollard v. *United States*, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957) 8
Ray v. *State*, 451 S.W.2d 854 (1970) 10
Saunders v. *Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1917) 7
State v. *Bly*, 215 Kan. 168, 523 P.2d 397 (1974) 11
State v. *Crawford*, 225 Tenn. 478, 470 S.W.2d 610 (1971) 6
State v. *Hyde*, 234 Mo. 200, 136 S.W. 316 (1911) 13
State v. *Johnson*, 222 N.W.2d 483 (Iowa, 1974) 11

Tucker v. *State*, 82 Nev. 127, 412 P.2d 970 (1966) 12, 13
United States v. *Broadway*, 477 F.2d 991 (5th Cir. 1973) 11
United States v. *Fisher*, 477 F.2d 300 (4th Cir. 1973) 10
United States v. *Jackson*, 482 F.2d 1167 (10th Cir. 1973) 9
United States v. *Lawrance*, 480 F.2d 688 (5th Cir. 1973) 12-13
United States v. *Woods*, 484 F.2d 127 (4th Cir. 1973) 12, 15
West v. *State of Louisiana*, 478 F.2d 1026 (5th Cir. 1973) 10
Wrather v. *State*, 179 Tenn. 666, 169 S.W.2d 854 (1943) 6, 13

Relevant Constitutional Provisions and Statutes

Tennessee Code Annotated, Section 39-904 3
U.S. Constitution, Amendments VI and XIV 2, 3, 9, 10, 12, 13, 16
28 United States Code 1257(3) 2

Text

McCormick on Evidence §190 (2nd ed. 1972) 11

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Tennessee, entered in this case on September 13, 1974.

JURISDICTION

The jurisdiction of this Court as granted in 28 U.S.C. §1257(3) is invoked by the petitioners on the grounds that their rights under the Fourteenth Amendment of the United States Constitution have been violated by the Court of Criminal Appeals of the State of Tennessee in an unreported opinion entered on September 13, 1974. The petitioners' petition for certiorari from the Supreme Court of Tennessee was denied without opinion on February 3, 1975. A timely motion for rehearing of this denial was denied on April 21, 1975. A stay of execution for 45 days was granted by the Criminal Court of Appeals on February 10, 1975 for making application to the United States Supreme Court.

QUESTIONS PRESENTED

1. Whether petitioners who were represented by privately retained counsel in their first appeal of right have been denied rights under the Fourteenth Amendment where the retained counsel failed to render effective assistance?

2. Whether the introduction of evidence of other crimes that is neither clear nor convincing violates petitioners' rights under the Sixth and Fourteenth Amendments?

3. Whether petitioners' rights under the Due Process Clause of the Fourteenth Amendment have been violated by their state court conviction based on insufficient evidence?

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

Sixth Amendment to the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section One of the Fourteenth Amendment to the United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The petitioners' conviction was based on the following statute:

Tennessee Code Annotated

39-904. Burglary in third degree—Safe-cracking —Penalty.—"Burglary in the third degree is the breaking and entering into a business house, outhouse, or any other house of another, other than dwellinghouse,

with the intent to commit a felony. Every person convicted of this crime shall be imprisoned in the penitentiary for not less than three (3) years nor more than ten (10) years. Provided, however, if the person convicted of this crime had in his possession a firearm at the time of the breaking and entering, he shall be imprisoned in the penitentiary not less than ten (10) nor more than fifteen (15) years.

Any person who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by any means, shall be punished by imprisonment for a term of not less than three (3) nor more than twenty-one (21) years. Provided, however, if the person convicted of this crime had in his possession a firearm at the time of the breaking and entering, he shall be imprisoned in the penitentiary not less than ten (10) years nor more than twenty-one (21) years."

STATEMENT OF THE CASE

I. Facts

The petitioners were charged with having committed third degree burglary at Gibson County Hospital in Trenton, Tennessee. (Technical Record p. 4). Petitioner Summerlin was seen standing in front of an open safe in the business office of the hospital at 2:00 P.M. (Bill of Exceptions 9, hereinafter cited as BE). A drawer was pulled out and he had his hand in a money bag. (BE 9). When a nurse walked into the room, he walked out of the room through the lobby and drove away alone. (BE 9, 24).

Nothing was taken. (BE 30). At the time the alleged burglary occurred, the hospital and the business office were open to the public. (BE 13). The safe was always left unlocked during business hours. (BE 30).

During the events described above, petitioner Holsen was sitting in the lobby adjoining the business office. (BE 23). Employees of the hospital said Mr. Holsen was watching them, but their testimony revealed that he made no attempt to prevent anyone from entering the business office. (BE 23). When Mr. Summerlin came out of the business office, he walked past Mr. Holsen without saying a word. (BE 23). Mr. Summerlin drove away in an automobile fitting the general description of an automobile owned by Mr. Holsen. (BE 24, 57).

The State was allowed, over objection, to introduce testimony concerning crimes which allegedly took place at two other hospitals in the same area. (BE 8). Two employees of one of these other hospitals testified that they observed the petitioners exhibiting unusual behavior at their hospital on a day when some money was found to be missing. (BE 39, 41, 42). A police officer of Union City testified that after receiving a call, he observed one of the petitioners, Holsen, running down the corridor of another hospital located in Union City. (BE 44-46). He later arrested the two petitioners. (BE 49).

Both petitioners were convicted of third degree burglary and sentenced to three years each. (BE 69).

An appeal of right to the Court of Criminal Appeals of Tennessee was perfected after the trial court denied the motion for a new trial. The petitioners were represented on appeal by the privately retained attorney who also represented them at the trial. Even though the record raised the issue of the admissibility of other crimes evidence, the

petitioners' appellate attorney failed to raise the point that under Tennessee law evidence of other crimes must meet the clear and convincing burden of proof in order to be admissible. *Wrather* v. *State*, 179 Tenn. 666, 169 S.W.2d 854 (1943), the leading case on the burden of proof for other crimes evidence was not cited in the brief nor was it cited in any of the cases cited in the brief. The other crimes evidence admitted at petitioners' trial obviously did not establish the other crimes clearly or convincingly; therefore, omission of this point from the brief was extremely harmful.

The petitioners' appellate counsel failed to point out to the court that Mr. Holsen's conviction should have been reviewed on the reasonable doubt standard. Under Tennessee law a conviction based solely on circumstantial evidence must be reversed on appeal if the court finds that the evidence leaves reasonable doubt. *State* v. *Crawford*, 225 Tenn. 478, 470 S.W.2d 610 (1971). The state admitted in its appellate brief that the evidence against Mr. Holsen was solely circumstantial. (page 8 of the brief). Since convictions are ordinarily reversed if the evidence preponderates in favor of the accused's innocence, this omission was prejudicial to Mr. Holsen.

The petitioners' appellate counsel failed to argue that the acts proved by the state did not constitute the offense of burglary because the statute under which the petitioners were charged required breaking and entry into a building as an element of the offense. (BE 60). Since it was established that the petitioners did not break and enter into the building, this omission was significant error.

Petitioners allege that these omissions by their appellate counsel denied them their right to the effective assistance of counsel.

The Court of Criminal Appeals affirmed their convictions in an unreported opinion entered September 13, 1974.

The Supreme Court of Tennessee denied certiorari on February 3, 1975 (rehearing denied April 21, 1975).

The petitioners are currently free on bond pursuant to a stay of execution granted by the Tennessee Court of Criminal Appeals on February 10, 1975.

II. How Federal Questions Are Presented

A. The federal question relating to the ineffective assistance of appellate counsel was not presented to the Court of Criminal Appeals, the court from which relief is sought. The petitioners are alleging that their counsel in the Court of Criminal Appeals failed to render effective assistance. Petitioners had no reasonable opportunity to present this question to the court in which the event occurred.

Where the violation of the right which is the basis of the federal question occurred in the highest court of the state, this Court has not required that the question has been raised below. *Saunders* v. *Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1917).

Since the Tennessee Supreme Court denied certiorari, the Court of Criminal Appeals is in effect the highest court of the state for this case.

B. The objection to the admission of the other crimes evidence was first presented to the trial court at pages 6, 7, 8 of the Bill of Exceptions as it appears in the record. Counsel for the petitioners argued that this evidence should have been excluded because it related to crimes not charged in the indictment and on the grounds that it would be fundamentally unfair to admit such highly prejudicial evi-

dence. The opinion of the Court of Appeals noted that the appellants' third assignment of error was based on the admissibility of the evidence of the other crimes. The Court of Appeals held that this evidence was relevant and properly admissible. (App.).

The issue of the sufficiency of the evidence to support the jury's verdict was first raised in a motion for a new trial made to the trial court. (Technical Record 17). This assignment of error was renewed to the Court of Appeals which held that the evidence was sufficient to sustain the convictions.

Petitioners admit that the record does not clearly and expressly raise the federal questions in regard to the admissibility and sufficiency of the evidence. However, petitioners contend that these questions were raised sufficiently to give this Court jurisdiction. In *Cissna* v. *State of Tennessee*, 246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720 (1918), this Court held that it had jurisdiction over questions not presented to the state court if the state court treated the question as necessarily involved and could not have decided the case the way they did without deciding the federal question. In *Pollard* v. *United States*, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957), this Court held that it had jurisdiction to consider issues that normally would not have been considered properly raised if the petitioner had acted pro se in the courts below. *Cissna* and *Pollard* together give this Court jurisdiction over the questions which the petitioners are presenting. In holding that the evidence was sufficient to support the verdict under state law, the Court of Appeals necessarily held that the evidence was sufficient to meet a due process challenge. The courts' ruling on the other crimes evidence also necessarily involves the holding that the admission of this evidence did not violate due process. Since

petitioners have alleged and believe that the record shows that their counsel on appeal failed to render effective assistance, their position is analogous to that in *Pollard*. Therefore, the requirement that the federal question be raised below need not be applied rigidly.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1(a) The Court should grant certiorari on the issue of whether the petitioners have been denied their Fourteenth Amendment rights as a result of the incompetence of their privately retained attorney because there is conflict among the Federal Circuit Courts on whether state action is present when an alleged violation of the Fourteenth Amendment is based on the quality of representation rendered by a privately retained attorney. Examples of Circuit Court decisions holding no state action to be present are as follows:

United States v. *Jackson*, 482 F.2d 1167 (10th Cir. 1973).

Copeland v. *Bets*, 471 F.2d 710 (5th Cir. 1973), cert. denied 412 U.S. 952.

Langford v. *State of Alabama*, 422 F.2d 760 (5th Cir. 1970), Justice Rives' dissent notes the conflict on this point inside the 5th Cir., cert. denied 400 U.S. 851.

Davis v. *Bomar*, 344 F.2d 84 (6th Cir. 1965), cert. denied 382 U.S. 883.

Examples of Circuit Court decisions holding that state action is present are as follows:

Garton v. *Swenson*, 497 F.2d 1137 (8th Cir. 1974).

West v. *State of Louisiana*, 478 F.2d 1026 (5th Cir. 1973).

United States v. *Fisher*, 477 F.2d 300 (4th Cir. 1973).

Goodwin v. *Cardwell*, 432 F.2d 521 (6th Cir. 1970).

The Tennessee Supreme Court has held that no state action can be found in privately retained attorneys' ineffective assistance. *Ray* v. *State*, 451 S.W.2d 854 (1970).

(b) The Court should grant certiorari on petitioners' claims of violation of their right to counsel under the Fourteenth Amendment in order to resolve the conflict among the Circuits on the proper test to be used in determining whether counsel's assistance has been ineffective. For example, the Eighth Circuit has used the "mockery of Justice" or "farce" test under which it has held that counsel's assistance is ineffective only if it rendered the trial a mockery of justice or a farce. *Cardarella* v. *United States*, 375 F.2d 222 (8th Cir. 1967). In *Brooks* v. *Texas*, 381 F.2d 619 (5th Cir. 1967), another court held that the proper test was whether the counsel was reasonably likely to render and in fact rendered reasonably effective assistance. A third test used by the Third Circuit judges that effective counsel exists when the attorney exercises the customary skill and knowledge which normally prevails at the time and place. *Moore* v. *United States*, 432 F.2d 730 (3rd Cir. 1970). If certiorari is granted, the petitioners will argue that the standard set out in *Moore* is the proper standard, but that their counsel on appeal failed to provide them effective assistance under any of the accepted tests.

(c) The Court should grant certiorari on the issue of whether petitioners' appellate counsel was ineffective in order to establish the scope of the right to counsel on

appeal as established in *Anders* v. *California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). *Anders* held that indigents were entitled to have their court appointed counsel act as an adversary on their behalf. A ruling on the petitioners' claims will establish whether appellate counsel's failure to raise points that a competent attorney would have raised can result in a denial of the right to appellate counsel. The California Supreme Court has held that failure to raise meritorious points can result in a denial of the right to appellate counsel. *In Re Smith*, 3 Cal. 3d 192, 474 P.2d 969 (1970).

2(a) The Court should grant certiorari because confusion exists among the state and federal courts as to what is the burden of proof to be carried by the prosecution when seeking to admit evidence of other crimes, and the constitutional dimensions of this burden.

There are several well established exceptions to the general prohibition against admitting evidence of other crimes against a criminal defendant. Some of these exceptions are: (1) to show a plan or scheme; (2) to show the absence of mistake; (3) to establish motive; (4) to show the specific intent required; and (5) to prove identity. McCormick on Evidence §190 (2nd ed. 1972). However, once evidence of other crimes is sought to be introduced, most courts have held that a burden of proof must be met before this evidence can be properly introduced. *Id.* The tests that have been used for this burden are varied. *See, e.g., United States* v. *Broadway*, 477 F.2d 991 (5th Cir. 1973)—(plain, clear, and conclusive); *State* v. *Johnson*, 222 N.W.2d 483 (Iowa, 1974)—(satisfactory proof that the accused was culpable); *State* v. *Bly*, 215 Kan. 168, 523 P.2d 397 (1974)—(sufficient facts and circumstances to raise a reasonable inference that the defendant committed the offense). Some courts have simply ignored the question

or have said that no standard exists other than the balancing of probative worth with undue prejudice. *See, e.g., United States* v. *Woods,* 484 F.2d 127 (4th Cir. 1973).

All of the previously cited decisions illustrate the state of confusion that exists among both state and federal courts as to the exact test to apply when admitting evidence of other crimes under one of the recognized exceptions. Nevertheless, their attempts to establish a burden of proof to be carried by the prosecution is an implicit recognition of the Constitutional dimensions of the question. The instant case presents this court with an important opportunity to establish a clear and consistent test for the admission of evidence of other crimes, and to define the Constitutional limitations of the use and misuse of such evidence.

Moreover, the admissibility of other crimes evidence has relevance to the problems of joinder and severance of multiple charges against criminal defendants. Since severance is of no benefit if the evidence of the other crimes is admissible at the separate trials, a rule on other crimes evidence would assist the courts in ruling on motions for severance.

(b) The court should grant certiorari because of the failure of the Criminal Court of Appeals to apply a clear and convincing standard in order to preclude the introduction of insubstantial evidence of other crimes in violation of the petitioners' rights under the Sixth and Fourteenth Amendments.

Several courts have held that before evidence of crimes other than those charged in the indictment may be introduced, the evidence of those other crimes must be clear and convincing. *See, e.g., Tucker* v. *State,* 82 Nev. 127, 412 P.2d 970 (1966); *United States* v. *Lawrance,* 480

F.2d 688 (5th Cir. 1973). "Fundamental Fairness demands this standard in order to preclude verdicts which might otherwise rest in false assumptions." *Tucker* v. *State, supra,* at 972. The rule has at least three Constitutional bases. First of all, it is fundamentally unfair to force an individual to defend against charges not contained in the indictment. To do so would be a violation of both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. *See, State* v. *Hyde,* 234 Mo. 200, 136 S.W. 316 (1911). Secondly, it is fundamentally unfair and a violation of Due Process to introduce evidence of other crimes against the defendant that the jury may cumulate to find guilt of the crime charged when, if considered separately, it would not so find. *See, Drew* v. *United States,* 331 F.2d 85 (D.C.Ct. App. 1964). And finally, it is fundamentally unfair that evidence of other crimes be admitted to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged. *Id.*

The probative value of any evidence of other crimes rests on two assumptions: (1) that the other crime was committed and (2) that the defendant committed that crime. *Wrather* v. *State,* 179 Tenn. 666, 169 S.W.2d 854 (1943). Where the prosecution does not make a clear and convincing showing of these two necessary assumptions, the probative value disappears, and any evidence subsequently introduced severely prejudices the defendants' Constitutional rights to defend only against those charges in the indictment, to be convicted only on evidence other than the mere sum of evidence on several charges, and to be convicted on evidence that proves something other than his general disposition to commit crime.

Even though the prosecution in the present case did not meet the clear and convincing standard, it was al-

lowed, over the objection of defense counsel, to introduce evidence of other crimes under the guise of showing a scheme or plan in which the defendants had participated. (BE 8). The petitioners were charged with having committed third degree burglary at Gibson County Hospital in Trenton, Tennessee. In his opening statement the prosecutor told the jury that the state would prove that the petitioners "set out . . . to rob hospitals." (BE 4). Under this theory the prosecution presented evidence of two other burglaries: (1) the testimony of two employees of Milan Hospital in Milan, Tennessee that the petitioners were observed at that hospital exhibiting unusual behavior on the day an undetermined amount of money was found to be missing (BE 39, 41, 42); and (2) the testimony of a Union City Police Officer that when he was called to the Union City Hospital, he observed one of the petitioners, Mr. Holsen, running down a corridor and out of the hospital. (BE 44-46). He and another officer arrested both of the petitioners at a restaurant a short distance from the hospital. The Criminal Court of Appeals held that this testimony was not evidence of other crimes. *See Appendix*. Therefore, the court did not reach the question of whether the evidence was clear and convincing.

It is the petitioners' contention that this evidence was indeed of other crimes. Although the state's witnesses did not expressly accuse the petitioners of robbing the other hospitals, the innuendo was clearly there. The fact that some money was discovered missing at one of these hospitals would not have been relevant if it was not an element of another crime allegedly committed by the petitioners. The fact that the other crimes were established by innuendo rather than express statement apparently led the court to hold that this evidence did not constitute evidence of crimes. This ruling violates petitioners'

rights under the Due Process Clause because it allows highly prejudicial evidence to be admitted even though the evidence has little probative value.

This kind of reasoning is not unique to the Tennessee Criminal Court of Appeals. In *United States* v. *Woods*, 484 F.2d 127 (4th Cir. 1973), the 4th Circuit held that evidence that other children in the care of the defendant had died or had suffered respiratory difficulties was admissible to prove that the defendant had committed the particular infanticide for which she was on trial. The court stated that "the evidence of what happened to the other children was not, strictly speaking, evidence of other crimes . . . With regards to no single child was there any legally sufficient proof that the defendant had done any act which the law forbids." *Id.* at 133. Yet the court went on to hold the evidence properly admissible because of its probative value. *Id.* at 35. Clearly the evidence was presented as proof that the defendant had committed other infanticides. Otherwise, it would not have been relevant. Simply because the evidence was not sufficient to convict the defendant of these other crimes does not mean it is not evidence of those other crimes.

In the present case, the prejudice to the petitioners in the admission of evidence of other crimes is clear. The only evidence against Holsen, excluding the evidence of other crimes, is that he was sitting in the lobby adjoining the room where the alleged burglary took place (BE 23), and that Mr. Summerlin drove away in a car fitting the general description of a car owned by Mr. Holsen. (BE 24, 57). Mr. Holsen made no attempt to prevent anyone from entering the room with the safe, nor to give the other petitioner, Mr. Summerlin, a warning when someone was approaching. The evidence against Mr. Summerlin, excluding the evidence of other crimes, is that he was seen

standing in front of an opened safe with one of the drawers pulled out. The sufficiency of this evidence is very doubtful, and it is clear that the jury was able to cumulate the evidence of all the other "crimes" to find petitioners guilty. Thus, petitioners' rights under the Sixth and Fourteenth Amendments have been violated by this cumulative effect and by the unfairness of being forced to defend against crimes not charged in the indictment.

Respectfully submitted,

JAMES R. EVERETT, JR.
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been forwarded to the Honorable William R. Hubbard, Assistant Attorney General, Supreme Court Building, Nashville, Tennessee 37219 this 15th day of April, 1975.

JAMES R. EVERETT, JR.
Attorney for Petitioners

IN THE
COURT OF CRIMINAL APPEALS OF TENNESSEE
JACKSON, APRIL SESSION, 1974

NO. 2

GIBSON CRIMINAL

LOUIS MANCE SUMMERLIN and
GRADY MONROE HOLSEN,
Plaintiffs in Error

V.

STATE OF TENNESSEE,
Defendant in Error

Hon. Dick Jerman, Judge

(Breaking After Entry)

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Assistant District Attorney General

Affirmed
Opinion Filed: Sept. 13, 1974
Charles H. O'Brien, Judge

OPINION

Defendants were convicted of breaking after entry and sentenced to three years confinement in the State Penitentiary. Judgment on the sentence was for not less than three nor more than three years.

On this appeal, defendants first assign as error that the evidence was insufficient to support the findings of the jury.

Defendant, Summerlin, was positively identified as the individual found in the business office of the Gibson General Hospital, crouched at an open safe, with the drawer pulled open and his hand in a money bag. He was followed from the hospital and observed to leave in a gold colored automobile with a dark top. Defendant, Holsen, was observed at the same time sitting in the waiting room of the hospital. An alarm was given and defendants were subsequently arrested in Union City. Defendant, Holsen, was identified by a police officer as the person whom he pursued at the Union City Hospital. Defendants were apprehended about a block from the hospital. The vehicle in which they were traveling was owned by defendant, Holsen, and answered the description of the vehicle in which Summerlin departed from the Gibson General Hospital in Trenton, Tennessee. Defendants offered no proof in rebuttal.

There was both direct and circumstantial evidence, more of which will be referred to in dealing with other assignments of error, which connected defendants with the offense of which they were convicted. We cannot say that this evidence was insufficient to support the findings of the jury. The assignment is overruled.

By their second assignment, defendants charge error in denial of a motion to suppress the testimony of the

State's witnesses, Linda Goodman, Pat Dodd, Linda Edwards, and Diane Fields, because of the tainted original identification by said witnesses.

The motion to suppress the testimony of Diane Fields was predicated on the allegation that she observed the defendants after they had been apprehended and were being escorted to the Trenton Jail in handcuffs by police officers. Subsequently they were presented for her observation individually, and it is alleged they were not afforded the right to counsel at that time. The objection to the testimony of Patricia Dodd and Linda Edwards seems to be that the witnesses were allowed to observe the defendants in the cell block where they were incarcerated and they were the only two persons in the cell at the time of identification. Defendants were not afforded a line-up of any sort at the time they were identified by these witnesses. The witness, Linda Goodman, identified the defendant, Summerlin, from photographs which were presented to her on the day after the offense occurred. It is argued that the pre-trial identification by these witnesses was made under such suggestive circumstances as to give rise to misidentification or tainted identification. Defendants' brief cites *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967; *Simmons* v. *United States*, 390 U.S. 377, 88 S.Ct. 967; and *Neil* v. *Biggers*, ... U.S. ....., 93 S.Ct. 375.

Of course, the right to counsel does not attach in the course of a routine police investigation prior to the commencement of a criminal prosecution. See *Kirby* v. *Illinois*, 406 U.S. 682, 92 S.Ct. 1877. Insofar as the in-court identification by the objected to witnesses is concerned, their testimony is convincing that their identification was made from their observation of the defendants at the time the offense occurred. While there was no evidence of-

fered at the hearing of the motion to suppress in regard to the purportedly tainted out of court identification, these witnesses were quite carefully cross-examined at trial in regard to their identification of defendants, and we do not find that the identification procedures employed was so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process. See *Neil* v. *Biggers*, supra.

By the final assignment it is contended it was prejudicial to admit the testimony of various witnesses, whose testimony did not relate to the crime with which defendants were charged and tried. These various witnesses testified to activities of the defendants earlier in the day and subsequent to the offense for which they were being tried, and included the circumstances of their arrest.

One witness, a thirteen year old child, testified she had seen the defendant, Summerlin, in St. Mary's Hospital coffee shop in Humboldt, Tennessee, where he had talked with her on the morning of March 31st, 1973. A witness testified both of the defendants had been in the City of Milan Hospital in the afternoon of that day. Another witness identified Summerlin as having been in the City of Milan Hospital but was not positive about his identification of Holsen. A police officer of the Union City Police Department testified he went to the Union City Hospital in response to a call. Arriving there he observed a man running down the corridor and gave chase. He lost sight of the individual but almost immediately observed a car leaving the hospital grounds which answered a description which had been given corresponding to the description of Holsen's vehicle. A few minutes later he saw the car at a restaurant located approximately one block from the hospital. Two private citizens were detaining Summerlin. Holsen was coming out of the rest-

room as the officer arrived on the scene. Another Union City police officer identified defendants in the courtroom as the persons who were arrested at the restaurant.

The objection to this testimony was based on the admissibility of evidence elicited by the State on the defendants' alleged involvement in other crimes on the same day in hospitals in the area.

We do not find there was evidence admitted of other crimes involving defendants. Certainly the testimony regarding their actions, conduct, and whereabouts for a period of time immediately preceding the crime with which they were charged was admissible to show a plan, scheme, device or the modus operandi of the defendants. The testimony of the Union City police officers related to their arrest after the alarm had been broadcast, giving their description and that of the vehicle in which they were traveling. We conclude that this testimony and evidence was relevant and properly admissible and the assignment is without merit.

All assignments are overruled and the judgment of the trial court affirmed.

/s/ Charles H. O'Brien
Charles H. O'Brien, Judge

Concur:

/s/ Mark A. Walker
Mark A. Walker, Presiding Judge

/s/ William S. Russell
William S. Russell, Judge

IN THE
COURT OF CRIMINAL APPEALS OF TENNESSEE
JACKSON

APRIL SESSION, 1974

NO. 2

GIBSON COUNTY

LOUIS MANCE SUMMERLIN and
GRADY MONROE HOLSEN,
Plaintiffs in Error

v.

STATE OF TENNESSEE,
Defendant in Error

ORDER

(Filed September 23, 1974)

On application of attorney for plaintiffs in error and for good cause shown, the time for filing a petition to rehear is hereby extended ten (10) days from and after the 23rd day of September, 1974, up to and including October 3, 1974.

This 23rd day of September

/s/ (Illegible)
Judge

IN THE
COURT OF CRIMINAL APPEALS OF TENNESSEE
JACKSON, APRIL SESSION, 1974

NO. 2

GIBSON CRIMINAL

LOUIS MANCE SUMMERLIN and
GRADY MONROE HOLSEN,
Plaintiffs in Error

v.

STATE OF TENNESSEE,
Defendant in Error

ORDER AND MEMORANDUM ON PETITION TO REHEAR

(Filed October 22, 1974)

A Petition to Rehear has been timely filed in this cause. The Petition urges that two critical issues in the case were not taken up in this Court's original opinion. It is the insistence of petitioners that we omitted to rule on the issue of whether or not the evidence established the offense as charged; and that we omitted to rule on the issue of whether or not the evidence establishes that defendant, Holsen, was aiding and abetting in the activities in which his co-defendant was allegedly engaged.

In the opinion in this case we stated that there was both direct and circumstantial evidence, ... which connected defendants with the offense of which they were convicted, and held that this evidence was sufficient to support the findings of the jury.

As a courtesy to newly retained counsel, and out of an abundance of caution for the rights of petitioners, we have again reviewed the evidence contained in the Bill of Exceptions. We are satisfied that the evidence in the record warranted the verdict of the jury against both defendants, and that the issues raised by the Petition to Rehear were duly considered in our original opinion in which that evidence was summarized.

There being no material matter raised which was overlooked by the Court in its original opinion, the Petition to Rehear is denied.

/s/ Charles H. O'Brien
Charles H. O'Brien, Judge

/s/ Mark A. Walker
Mark Walker, Presiding Judge

/s/ William S. Russell
William S. Russell, Judge

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

GIBSON CRIMINAL

NO. 2

LOUIS MANCE SUMMERLIN and
GRADY MONROE HOLSEN

vs.

STATE OF TENNESSEE

This cause came on to be heard upon petitions for certiorari and replies thereto, and after full consideration by the Court, the Court is of the opinion that there is no merit in said petitions, and the same is accordingly denied at the cost of the petitioners, for which let execution issue.
2-3-75

THE STATE OF TENNESSEE

I, JEWEL REDDEN, Clerk of the Supreme Court of said State for the Western Division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of the ORDER DENYING PETITION FOR CERTIORARI pronounced by said Court at its April Term, 1974, in the case of LOUIS MANCE SUMMERLIN and GRADY MONROE HOLSEN against STATE OF TENNESSEE as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in the City of Jackson, on this the 3rd day of February A. D., 1975.

/s/ Jewel Redden
Clerk

(Seal)

IN THE
COURT OF CRIMINAL APPEALS OF TENNESSEE
JACKSON, APRIL SESSION, 1974

No. 2

Gibson Criminal

LOUIS MANCE SUMMERLIN and
GRADY MONROE HOLSEN
Plaintiffs in Error

V.

STATE OF TENNESSEE,
Defendant in Error

STAY ORDER

(Filed February 10, 1975)

Upon application of defendants for stay of execution on the judgment heretofore entered in this cause for the purpose of making application for writ of certiorari in the United States Supreme Court,

it is ordered that enforcement of the judgement heretofore entered in this case be stayed and petitioners allowed to remain at large on bond in the sum of ten thousand dollars ($10,000) and six thousand dollars ($6,000) respectively, conditioned upon their making application for writ of certiorari to the United States Supreme Court within 45 days of the date of this order, otherwise execution of the judgement entered herein shall be enforced.

On this 10th day of February, 1975.

/s/ Charles H. O'Brien
Charles H. O'Brien, Judge

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

Gibson Criminal

Docket No. 2 C.C.A.

LOUIS MANCE SUMMERLIN and
GRADY MONROE HOLSEN,
Petitioners

vs.

STATE OF TENNESSEE,
Respondent

ORDER ON PETITION TO REHEAR

(April 21, 1975)

On consideration of the petition to rehear filed in this case, the authorities cited in support thereof, and the entire record, we adhere to our holding that the petition for writ of certiorari is without merit, and the petition is denied.

Per Curiam

The following is the substantive portion of the brief that was filed on petitioners' behalf in court below:

BRIEF AND ARGUMENT

The first assignment of error challenges the sufficiency of the evidence upon which the defendants' convictions were predicated. In summary, it is the Defendants' contention that the evidence adduced by the trial is insufficient to support their conviction of "breaking after entry."

It is well settled that this Court may overturn the verdict of the jury when the evidence clearly preponderates against such a finding and in favor of the innocence of the accused. *Phillips* v. *State*, 480 S.W.(2d) 361; *Morelock* v. *State*, 460 S.W.(2d) 861; *Webster* v. *State*, 425 S.W.(2d) 799. Many more cases could be cited to sustain this Assignment, but the principles enunciated by this Court and to which it must adhere in reviewing the record are now well established.

It is the contention of the Defendants that a careful review of the record in this cause will clearly demonstrate that the evidence does not measure up to the standards required to support the verdict. To the contrary, the Defendants submit that the record is totally devoid of the essentials necessary to establish the gravamen of the offense for which they were charged and convicted.

In particular, it should be noted that the State's proof on the "breaking" was, at best, merely speculation. Witness Goodman testified that upon entering the business office she observed the defendant Summerlin kneeling or crouched in front of the opened safe with his hand in a drawer. However, she did not by her testimony establish that the Defendants had opened the door to the safe. (BE 9, 12) Likewise, Diane Fields shed no light or offered any evidence on the issue of the "breaking" as her testimony was directed to the period following the encounter by Linda Goodman with the defendant Summerlin.

Patt Dodd's testimony is no more illuminating. She was unable to state unequivocally if the door to the safe was opened or closed, saying that she did not know if it was open, but they did not usually make it a habit of leaving it open. As to the door to the business office, she testified that when she went on break she closed the door to the business office; however, she admitted that she was absent from the office 20 to 25 minutes, during which time the burglary allegedly occurred. Moreover, the record is silent as to the fact that the office area is off-limits to the general public.

The section under which Defendants were charged is Sec. 39-904, Tennessee Code Annotated, and reads as follows:

> Burglary in the third degree is the breaking and entering into a business house, outhouse, or any other house of another, other than dwelling-house, with the intent to commit a felony. Every person convicted of this crime shall be imprisoned in the penitentiary for not less than three (3) years nor more than ten (10) years. Provided, however, if the person convicted of this crime had in his possession a firearm at the time of the breaking and entering, he shall be imprisoned in the penitentiary not less than ten (10) nor more than fifteen (15) years.
>
> Any person who, with intent to commit crime, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by any means, shall be punished by imprisonment

> for a term of not less than three (3) years nor more than twenty-one (21) years. Provided, however, if the person convicted of this crime had in his possession a firearm at the time of the breaking and entering, he shall be imprisoned in the penitentiary not less than ten (10) years nor more than twenty-one (21) years.

The aforementioned statute was considered in the case of *Fox* v. *State*, 214 Tn. 694, 383 S.W.(2d) 25, and later in the case of *Heald* v. *State*, 472 S.W.(2d) 242. In both cases the facts were substantially the same—the charges arising out of the theft of money from the coin box of a pay telephone booth. In each case, the defendants attempted to place themselves outside the purview of the section by arguing that there was no breaking and entering of the booth. The Court in overruling these arguments and sustaining the convictions reasoned that the offense is completed if the person notwithstanding his legal entry into the premises, breaks open a coin receptacle inside.

In the case *sub judice* the evidence fails to establish beyond a reasonable doubt a "breaking" of the safe or the room in which the safe was located. There can be no doubt the hospital is a public facility open to all. Moreover, the record is devoid of any evidence to the fact that the business office was closed to the public or that the Defendants opened a door to said office. In the same vein, the Defendants submit that the record is also devoid of any evidence establishing that the safe was broken into. As has been heretofore noted, the witnesses testifying on this subject were less than certain, one stating that she did not know, and the other stating that it was the custom to shut the door to the safe.

The Defendants submit, therefore, that the State's proof is insufficient to sustain the conviction.

By their second assignment of error, the Defendants challenge the trial court's ruling on their motion to suppress the identification testimony of three of the State's witnesses on the ground that the witnesses in court identifications of the defendants were tainted by pretrial identifications which were unduly suggestive.

The Defendants filed a motion to suppress the testimony of Linda Edwards, Patricia Dodd, Linda Goodman and Diane Fields. (TR 6-11) The gist of these motions was that the pretrial identifications of the Defendants by these persons were made under such suggestive circumstances as to give rise to misidentification or tainted identification. The facts surrounding the identification were stipulated to by the parties and will not be reiterated herein.

In the case of *Stovall* v. *Denno*, 388 U.S. 293, 18 L.Ed. (2d) 1199, 87 S.Ct. 1967 (1967), the United States Supreme Court held that the defendant could claim that . . . "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. 388 U.S. at 301-302, 18 L.Ed.(2d) 1199. This determination must be made "on the totality of the circumstances."

Again in *Simmons* v. *U. S.*, 390 U.S. 377, 19 L.Ed.(2d) 1247, 88 S.Ct. 967 (1968), the Court held that "each case must be considered on its own facts, and that convictions based on eyewitnesses identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U.S. at 384.

In *Neil* v. *Biggers*, ... U.S. ....., 34 L.Ed.(2d) 401, 93 S.Ct. ....., the Court noted "that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification' ". 34 L.Ed.(2d) at 410. In determining whether under the totality of the circumstances the identification was reliable, the Court noted that several factors should be considered. Among the factors to be considered in making such a determination are the opportunity of witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation.

It is the contention of the Defendants that the confrontation conducted by the police officers, when considered in the totality of the circumstances, was so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process. While not reiterating the entire record as same pertains to the pretrial confrontation, the Defendants would most respectfully invite this Court's attention to several facts which they consider to be germane to this assignment.

The witness Linda Goodman was shown two photographs from which she identified the Defendant Summerlin. At the time she saw the Defendant Summerlin, she admitted that she was shocked and frightened and that the total encounter with Summerlin was only 4 or 5 seconds. Furthermore, when she saw Summerlin it was from the side as he was kneeling in front of the safe. It is obvious from these facts that this witness's opportunity to observe was, at best, limited.

As to Diane Fields, her testimony was to the effect that she saw a man come out of the business office and run past her in the corridor. Again, the opportunity to observe

was extremely limited. Following this brief encounter, she was shown both of Defendants when they were brought into the jail manacled and in the custody of two officers. At that time she was able to identify Summerlin. Afterwards, both men were returned, one at a time, for her to view.

Patricia Dodd and Linda Edwards were taken to the jail the day following the alleged robbery and were shown the Defendants in their cell. The Defendants were the only people incarcerated at the time, and the witnesses naturally identified the Defendants.

The Defendants agree that in each of the above situations the witnesses were shown one or both of the Defendants in such a manner and under such circumstances as would cast suspicion on any attendant identification. If the witnesses had any reservations, they would have been dispelled by the fact that these men, when observed, were in police custody and accordingly had to be guilty of the offense charged. Viewed in light of all the facts, the Defendants submit that the pretrial confrontation with each of the witnesses was so suggestive as to warrant exclusion of the testimony by them.

The Defendants' third Assignment of Error challenges the admissibility of evidence elicited by the State on the Defendants' alleged involvement in other crimes on the same day in hospitals in the area.

The rule is generally said to be that evidence of other crimes by the defendant is not admissible merely to prove his disposition to commit such a crime as he is being tried for; but such evidence is admissible when it is relevant to prove some other material issue on trial; for instance, when it tends to establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or

plan for commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the defendant on trial. *Carroll* v. *State*, 370 S.W.(2d) 523; *Campbell* v. *State*, 469 S.W.(2d) 506; *Snowball* v. *State*, 477 S.W.(2d) 240.

The obvious evil to be guarded against by this exclusion rule is that such evidence will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial. The problem is not merely one of labeling, but one of balancing, on the one side, the actual need for the other-crimes evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused were the actors, and the strength or weakness of the other-crimes evidence in supporting the issue; and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.

In the case *sub judice*, the other-crimes evidence was ostensibly offered to show a common scheme or plan on the part of the Defendants. However, it is the contention of the Defendants that the probative value of this evidence —for whatever purpose—was outweighed by the dangers inherent in the use of such evidence.

The State proved by Carol Klyce, a thirteen year old, that on the morning of March 13, 1973, the Defendant Summerlin was in the public coffee shop of St. Mary's Hospital in Humboldt, Tennessee. Brenda Smith and Larry Butler placed the Defendants in the Milan Hospital on the afternoon of March 31, 1973 and described them and their activities in such a manner as to arouse suspicion and concluded with the statement that on March 31, 1973, some money was determined to be missing from the hospital. Further, the testimony of the police officers regarding the arrest of the Defendants is equally prejudicial.

It is obvious that the foregoing evidence was of little probative value and served no purpose other than enabling the jury to infer that the Defendants by their presence in said hospitals meant criminal activity even though no such proof was forthcoming. Moreover, such evidence is so suggestive that it would appear that it was sufficient to sway the jury from its stance of impartiality to one of prejudice; to cloud and confuse the issues. This conclusion seems to be ever more inescapable in view of the evidence adduced at this trial on the issue of the robbery at Gibson County General Hospital. If any doubt remained in the minds of the jury, it was surely dispelled by the other-crimes evidence which apparently created in the jurors' minds the idea that regardless of the State's proof of the crime charged; the Defendants were predisposed to criminal activity and should, accordingly, be found guilty. The Defendants submit that the introduction of said evidence was an abuse of discretion and operated to prejudice their rights.

CONCLUSIONS

In view of the foregoing, the Defendants respectfully submit that the judgment of the trial court should be reversed and the cause remanded for a new trial.

Respectfully submitted,

/s/ Robert Kinton
Robert Kinton
Attorney for Defendants